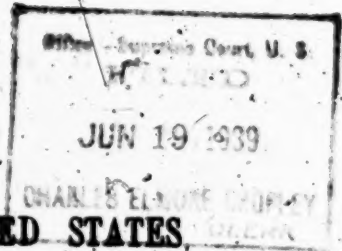


FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

vs.

Appellant,

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN
FEUERSTEIN AND GEORGE O'BRIEN.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

WILLIAM LEMKE,
JAMES J. McMANAMY,
Counsel for Appellant.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Federal question presented	1
Manner in which the Federal question was raised.	2
How question raised in trial court	3
On appeal to the Supreme Court of Wisconsin	3
Exhibit "A"—Opinion of the Supreme Court of the State of Wisconsin	4

STATUTE CITED.

Bankruptcy Act, Section 75 (n), 48 Statutes at Large 1289, Chapter 869, as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792	1, 2
---	------

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1939

Case No. ____.

ERNEST NEWTON KALB,

vs.

Appellant,

ROSCOE R. LUCE, HENRY FEUERSTEIN AND HELEN
FEUERSTEIN AND GEORGE O'BRIEN,

Appellees.

STATEMENT AS TO JURISDICTION.

Action to recover in damages for loss of appellant's farm, for damages for assault and battery and false imprisonment.

Federal Question Presented.

The Federal question here presented is whether after the filing of a petition by a farmer under Section 75 (n) of the Bankruptcy Act as amended August 28, 1935, 49 Statutes at Large 943; Chapter 792, and while such petition is pending, a State court in which a mortgage foreclosure of the petitioner's farm is pending, such court has jurisdiction to confirm a sheriff's report of sale and direct the delivery of a deed to the mortgagee, the purchaser.

Manner in Which the Federal Question was Raised.

The appellant bases his right to maintain this action on the ground that the order of the District Court of the United States for the Eastern District of Wisconsin made September 6, 1935, reinstating his petition which was filed on October 2, 1934, under Section 75 (n) of the Bankruptcy Act, 48 Statutes at Large 1289, Chapter 869, as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792, instantanr divested the State court of all jurisdiction to enter an order on September 16, 1935, confirming a sheriff's report of sale in a mortgage foreclosure had on July 20, 1935, and that the order so entered confirming such report of sale and directing the delivery of a sheriff's deed is wholly void. The prayer is for damages. Section 75 (n) of the Bankruptcy Act, 49 Statutes at Large 943, Chapter 792, reads as follows:

“That section 75 of said Act, as amended, be further amended by amending subsection (n) to read as follows:

“(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all of his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.”

The appellant asserts that the filing of his petition vests the Federal court with exclusive jurisdiction of all of his property and protects it from interference by State courts, and divests all State courts of jurisdiction while his petition is so pending; that no restraining order to the State court is required to effect such protection.

How Question Raised in Trial Court.

A general demurrer to the complaint was sustained by the trial court as to the defendants Luce and Feuerstein and was overruled as to the defendant O'Brien.

On Appeal to the Supreme Court of Wisconsin.

On appeal to the Supreme Court of Wisconsin so much of the order as affirmed the demurrer of the defendants Luce and Feuerstein was affirmed; and that part of the order overruling the demurrer of the defendant O'Brien was reversed.

That on December 29th, 1938, the trial court entered judgment dismissing the complaint.

On appeal to the Supreme Court of Wisconsin the judgment dismissing the complaint was affirmed on April 20th, 1939, and from such judgment this appeal is taken.

WILLIAM LEMKE,

Fargo, North Dakota,

Attorney for Appellant.

JAMES J. McMANAMY,

Madison, Wisconsin,

Attorney for Appellant.

EXHIBIT "A".

IN SUPREME COURT, STATE OF WISCONSIN.
JANUARY TERM, 1939.

ERNEST NEWTON KALB, *Appellant*,

vs.

ROSCOE R. LUCE *et al.*, *Respondents*.

Appeal from a judgment of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. *Affirmed.*

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 29, 1938. From that judgment the plaintiff appeals.

By the Court:

The issues raised upon this appeal were considered by this Court in *Kalb v. Luce* (1938), 228 Wis. 519, 279 N. W. 685. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

STATEMENT OPPOSING JURISDICTION

FILE COPY

Office - Supreme Court, U. S.

FILED

JUL 6-1939

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN
FEUERSTEIN AND GEORGE O'BRIEN,**

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM.**

**A. T. THORSON,
J. ARTHUR MORAN,**
Counsel for Appellees.

INDEX.

SUBJECT INDEX.

	Page
Statement opposing jurisdiction	1
Motion to dismiss or affirm filed on behalf of appellees, Roscoe R. Luce and George O'Brien	5
Motion to dismiss or affirm filed on behalf of appellees, Henry Feuerstein and Helen Feuerstein	7

STATUTES CITED.

Bankruptcy Act, Section 75 (n), as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792	1
Wisconsin Statutes, Section 278.10	2
Section 278.13	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

vs.

Appellant,

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN
FEUERSTEIN AND GEORGE O'BRIEN,**

Appellees.

JOINT STATEMENT OPPOSING JURISDICTION.

For the sake of brevity, no additional Statement of Facts is here made but reference is made to the opinions of the State court attached as Exhibits A and B to the Statement as to Jurisdiction in Case No. 374 of the October Term, 1938.

The Appellees severally contend that there is no substantial Federal question presented by this appeal for the following reasons:

1. The stay provided by Section 75 (n) of the Bankruptcy Act as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792, is a *judicial* stay and not an automatic or statutory one. The statute is an assertion of jurisdiction in the Federal court and the filing of a petition only serves

to create rights which are grounds for a judicial stay if properly asserted. To hold that mere filing of the petition divested the State court of jurisdiction in the foreclosure case would throw the whole matter of titles into inextricable confusion. This rule is too well settled for reasonable argument.

2. In Wisconsin, the foreclosure sale is not had until the expiration of one year from the date of the foreclosure judgment. Sec. 278.10, Wisconsin Statutes.

Sec. 278-13, Wisconsin Statutes provides in part:

“The mortgagor . . . may redeem the mortgaged premises at any time before the sale . . .”

To hold that the State court lost jurisdiction in the foreclosure proceedings by the filing of the petition after more than one year from the date of the foreclosure decree when the period of redemption had expired or at least run for more than one year (and in this case more than two years) would be an application of the so-called Second Frazier-Lemke Act which would make it unconstitutional as it has been definitely decided that Congress has no power to extend the period of redemption after the time had begun to run.

3. The complaint affirmatively demonstrates debtor appellant's failure to pursue the proper remedy by appealing from the judgment of the State court confirming the foreclosure sale, and by debtor's discontinuance of the bankruptcy proceedings and his failure to prosecute such proceedings to a conclusion.

4. The Full Faith and Credit Clause of the Federal Constitution would be violated if the Court refused to recognize the validity of the foreclosure sale and confirmation as it appears that the foreclosure decree was entered April 21, 1933, and the filing of debtor's petition under

Sec. 75 of the Bankruptcy Act as amended August 28, 1935, was not until September 6, 1935, and the period of redemption had already expired or at least had begun to run more than two years prior thereto.

5. Filing of the petition under the Second Frazier-Lemke Act appears to have been solely for the purpose of delay and harassment and debtor appellant having failed to prosecute the proceedings instituted by him in the Federal court, four years having now elapsed since the date of the reinstatement of his amended petition.

6. The Appellee, Roscoe R. Luce, is the County Judge of Walworth County and the complaint is so framed that its allegations so far as he is concerned, show that what he did was done in his judicial capacity. It is obvious that whether his decision was right or wrong, that he acted with a *color* of jurisdiction; in fact, the Trial Court and the Supreme Court of Wisconsin have decided that he did have jurisdiction. A Judge is immune from prosecution at the suit of a disappointed litigant, and hence no cause of action is stated against the Appellee, Luce, even if it were conceded that there was an improper construction of the Federal statute.

7. The Appellee, George O'Brien, was the Sheriff of Walworth County and the complaint is so framed that its allegations show that what he did was done in his official capacity. It is the fixed law of Wisconsin that where a sheriff executes a writ fair on its face, that it is not his duty to pass upon its sufficiency but it constitutes a complete protection to the officer executing it, even where the magistrate acted without jurisdiction. Hence, no cause of action is stated against the Appellee, O'Brien, even if it were conceded that there was an improper construction of the Federal statute.

8. The complaint in the State court affirmatively shows that the Appellees, Henry Feuerstein and Helen Feuerstein, acted solely in an attempt to exonerate their legal rights and cannot be held liable for any tort arising out of an honest statement of fact made to the magistrate having jurisdiction in the proceedings.

Dated July 5, 1939.

ARTHUR T. THORSON,
J. ARTHUR MORAN,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

vs.

Appellant,

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN.
FEUERSTEIN AND GEORGE O'BRIEN,**

Appellees.

Upon the foregoing Joint Statement Opposing Jurisdiction, and upon the records and files herein, the Appellees, Roscoe R. Luce (County Judge), and George O'Brien (Sheriff), by their attorneys, move the Court for an order dismissing the appeal for want of a substantial Federal question, and, in the alternative, for an order affirming the judgment of the Supreme Court of Wisconsin for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated July 5, 1939.

**ARTHUR T. THORSON,
J. ARTHUR MORAN,**
*Attorneys for Roscoe R. Luce
and George O'Brien.*



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

vs.

Appellant,

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN
FEUERSTEIN AND GEORGE O'BRIEN,**

Appellees.

Upon the foregoing Joint Statement Opposing Jurisdiction, and upon the records and files herein, the Appellees, Henry Feuerstein and Helen Feuerstein, by their attorney, move the Court for an order dismissing the appeal for want of a substantial Federal question, and, in the alternative, for an order affirming the judgment of the Supreme Court of Wisconsin for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated July 5, 1939.

J. ARTHUR MORAN,
*Attorney for Henry Feuerstein
and Helen Feuerstein.*